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Utah Supreme Court

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Harold A. Hintze; Attorneys for Appellant;

Gifford W. Price; Attorneys for Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BETH S. LEWIS,	:	
	:	
Plaintiff-	:	
Appellant,	:	
	:	
vs.	:	
	:	
THOMAS G. PIKE, individually,	:	Case No. 18195
THE LOCKHART COMPANY, a Utah	:	
Industrial Loan Corporation;	:	
and AMERICAN BANKERS LIFE	:	
ASSURANCE COMPANY OF FLORIDA,	:	
a foreign corporation,	:	
	:	
Defendants-	:	
Respondents.	:	

BRIEF OF APPELLANT

Appeal from the Judgment of
The Third Judicial District Court of Salt Lake County
Honorable G. Hal Taylor, Judge

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FILED

MAR 16 1982

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action was brought by plaintiff (appellant) against defendants (respondents) for damages incurred to plaintiff upon the death of her husband by defendants' negligent failure to process a loan application to include credit life insurance on the life of plaintiff's husband.

DISPOSITION IN LOWER COURT

Defendants' Motion for Summary Judgment was heard on December 3, 1981. The District Judge, Honorable G. Hal Taylor, granted summary judgment in favor of defendants. Judgment was entered on December 15, 1981.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court set aside the summary judgment entered in this matter and order the case to be tried on the merits.

STATEMENT OF FACTS

In June of 1979 Darrel Lewis, husband of appellant Beth S. Lewis, began having dizzy spells. He visited Dr. Hurbert Burton in Bountiful and was hospitalized for about four days because of heart-related and blood pressure problems. Deposition digest of Beth S. Lewis, (hereinafter "Lewis deposition") pp 15-22.

Near the end of June, 1979 respondent Thomas G. Pike, an employee of The Lockhart Company, contacted Mr. Lewis (since deceased) by telephone with respect to a mortgage contract on the Lewis home which The Lockhart Company had just purchased. During the course of the conversation a debt consolidation loan was discussed. Deposition digest of Thomas G. Pike (hereinafter "Pike deposition") pp 5-6. Mr. Pike mailed a loan application to the Lewis'. Exhibit "1" to Lewis deposition. Mr. and Mrs. Lewis discussed the loan application and appellant, concerned over her husband's heart problems, stated to her husband that she would not mortgage her home "without an insurance policy on it." Lewis deposition, pp 30-31. The proposed loan was for the purpose of paying off all of the Lewis' outstanding debts.

On or about July 2, 1979 appellant and her husband visited respondent Lockhart Company for the purpose of obtaining a loan in the approximate amount of \$18,000.00. While meeting with respondent Thomas G. Pike at The Lockhart Company, appellant and her husband were shown a loan disclosure statement. This disclosure statement is attached to the Lewis deposition as Exhibit "5" and to the Pike deposition as Exhibit "1." Mr. Pike explained to the Lewis' at the closing that the applied-for loan did not include in the repayment figures the premium for credit life insurance. Appellant informed Mr. Pike and her husband that she would not consent to the issuance of any loan which did not include credit life insurance on the life of her husband. Lewis Affidavit, ¶'s 4 & 5; Lewis deposition, p 39. Appellant specifically informed Mr. Pike that no lien, mortgage or trust deed would be signed giving The Lockhart Company an interest in the Lewis home unless credit life insurance was taken out on the life of Darrel Lewis. The only discussion thereafter had between appellant, Mr. Lewis and Mr. Pike concerned figures for including joint credit life insurance on both Mr. Lewis and appellant. Lewis Affidavit, ¶6.

At the time of the loan closing, Mr. Pike drew Mr. and Mrs. Lewis' attention to that part of the disclosure statement dealing with insurance. Lewis Affidavit, ¶7. The insurance portion of the disclosure statement contains various sub-parts in which the borrowers are to indicate

whether they desire disability insurance, single or joint credit life insurance, or whether they do not want credit life or disability insurance. After the borrower indicates his choice(s) on the disclosure statement, he is to sign and date the insurance portion of the statement. Mr. Pike indicated that the section of the disclosure statement relating to insurance "would be left open for determination of whether the credit life would be on Mr. Lewis only or on your life [Mrs. Lewis] and Mr. Lewis jointly." Lewis Affidavit, ¶7; see also Lewis deposition, p 39. The loan was closed with an understanding on appellant's part that, based on appellant's verbal refusal to consent to the trust deed lien on her home without credit life insurance on her husband, the only matter left for further arrangement would be whether or not insurance would be on joint lives or on her husband's life only. Lewis Affidavit, ¶8. At no time did appellant ever authorize Mr. Pike to issue the loan or loan proceeds without, at a minimum, credit life insurance on her husband, and appellant was informed that the insurance could be issued at any time after the loan was closed. Lewis Affidavit, ¶9. The loan proceeds were disbursed ten days after the loan closing. Lewis deposition, pp 40-41 and Exhibit "5." After the closing, Mr. Lewis attempted to contact Mr. Pike on different occasions in order to obtain additional information about credit life insurance. Lewis Affidavit, ¶9. Although the

record cannot reflect every attempt by the late Mr. Lewis to contact Mr. Pike, several attempts have been verified.

On August 5th or 7th, 1979 when Mr. Lewis went personally to The Lockhart Company to make the first payment due on the loan, he attempted to contact Mr. Pike, but being unsuccessful, left a note for Mr. Pike which related to insurance. Pike deposition, p 29; Lewis deposition, pp 42-43. Mr. Lewis reported to appellant that he had gone to The Lockhart Company and had taken care of everything and that Mr. Pike was not available. Lewis deposition, p 42. Mr. Lewis tried to reach Mr. Pike by telephone around the middle of August, 1979. Lewis deposition, pp 44-45. Mr. Lewis made a second personal visit to The Lockhart Company sometime before the end of August, 1979 to discuss insurance with Mr. Pike, and failing to find Mr. Pike in left a second note for him. This note is attached to the Lewis deposition as Exhibit "6" and the Pike deposition as Exhibit "2" and reads as follows:

Dear Mr. Pike,
I left a note for you to give me the
info the amount life ins would cost
per month. I did not hear from you.
Could you please give me this info.
Thank you.
D. E. Lewis

Mr. Pike's secretary sent Mr. Lewis the following letter (which was found by appellant in her husband's desk after his death):

Mr. Lewis,
Tom Pike has gone on vacation and
won't be back till Tuesday, Aug 28.

So when he gets here I'll give him
the note and tell him what you said.
J.M.

Mr. Lewis died of a heart attack on September 17, 1979. Lewis deposition, p 41. Appellant called The Lockhart Company near the end of September, 1979 asking how to handle the loan with mortgage insurance and she was informed there was no credit life insurance on her husband. Lewis deposition, pp 46-47. Within a day or two after the telephone call, appellant visited Mr. Pike at The Lockhart Company and was informed by Mr. Pike that he had received the above-quoted note from Mr. Lewis, but that he had in fact never gotten back in touch with him about it prior to Mr. Lewis' death. Lewis deposition, pp 47-49; Lewis Affidavit, ¶10. At that time Mr. Pike gave appellant a copy of the second note of which appellant was unaware. Lewis deposition, p 48.

Appellant paid off the referred-to loan around the middle of November, 1979 with life insurance proceeds she had received from an insurance policy provided by her husband's employer. Lewis deposition, p 51. Shortly thereafter, appellant sought legal counsel and filed the complaint in this case wherein it is alleged that respondents were negligent in failing to, among other things, (1) obtain the necessary and requested insurance, (2) provide Darrel Lewis with all information relative to the obtaining of the insurance, and (3) timely process the

loan application and insurance application so as to reflect the existence of credit life insurance.

ARGUMENT

POINT I: THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE EXISTS GENUINE ISSUES AS TO MATERIAL FACTS WITH RESPECT TO WHETHER DEFENDANTS' FAILURE TO PROVIDE INSURANCE OR FOLLOW-UP ON REQUESTS FOR OR INQUIRIES RELATING TO INSURANCE CONSTITUTED NEGLIGENCE AS TO APPELLANT.

The proper standard to be followed in reviewing a lower court's grant of summary judgment was enunciated by the Utah Supreme Court in the case of Bullock v. Deseret Dodge Truck Center, Inc., 354 P.2d 559, 561 (1960):

A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that, "there is no genuine issue as to any material fact and that the moving party should be entitled to judgment as a matter of law." Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor.

Viewing the evidence, admissions and inferences contained in the record below in the light most favorable to appellant, it is clear that there are genuine issues of material fact with respect to whether defendants were negligent in the handling of the Lewis' requests or inquiries relating to credit life insurance.

Appellant states in her Affidavit that she "informed both Mr. Pike and her husband" during the loan closing that she "would not consent to the issuance of any loan which did

not include credit life insurance" on her husband's life. Lewis Affidavit, ¶5. Mr. Pike, however, denied that such a statement was made and stated that there "was a decision not to have insurance" at the time of the loan closing. Pike deposition, pp 20, 27 and 28. Accepting appellant's Affidavit as true, which the court must do under the Bullock standard, an issue of fact is created as to whether defendants were negligent in not seeing that appellant's insurance demands were finalized prior to the issuance of the loan proceeds.

The insurance section of the disclosure statement (Lewis deposition, Exhibit "5," Pike deposition, Exhibit "1") referred to in the above statement of facts and the discussions relating thereto raise further issues of fact as will be shown. It is important to note that the sub-parts of the insurance section of the loan disclosure statement relating to disability and credit life insurance which are to be filled out and signed by the borrower, if the borrower desires insurance, are in regular type face, while the sub-part relating to the election not to have insurance which is to be filled out and signed, if such an election is made, has bold face type and reads as follows: "I DO NOT want credit life or disability insurance." The logical inference which follows is that The Lockhart Company felt it essential that this sub-part be filled out and signed by all those who do not desire insurance in order that no question of fact be raised later on. As noted by the disclosure

statement, the entire section relating to insurance is blank. Mr. Pike stated at page 20 of his deposition that the Lewis' had made a decision prior to the time of the loan closing not to have insurance "and that is why the disclosure was filled out the way it was." When asked why the part of the disclosure statement where the borrower elects not to have credit life insurance was not filled out and signed, he stated: "I'm just not totally sure in this case. This is done at the time of closing when we are together." Pike deposition, p 20. Mr. Pike admitted that he was the only employee of The Lockhart Company present at the closing and then when asked if it was The Lockhart Company's normal procedure where credit life insurance is refused to require the section of the form which states "I DO NOT want credit life or disability insurance" to be filled out and to have the borrowers sign and date that section, he stated: "Sometimes it is, sometimes it isn't." Pike deposition, p 21. Mr. Pike's elusive answer, when viewed in the light most favorable to the appellant, means, for purposes of this appeal, that it was indeed company policy on this occasion to fill out this section of the statement. This was not done. The failure to do so corroborates appellant's version of the facts that the reason the insurance section was left blank was because, while she was firm on her decision not to take out the loan without credit life insurance on her husband, the Lewis' were undecided as to whether credit life insurance should be

purchased for Mrs. Lewis also. Appellant states the insurance section of the disclosure statement was to be filled in when she or her husband got back in touch with Mr. Pike and informed him of their decision with respect to whether they wanted joint insurance. Lewis deposition, p 39; Lewis Affidavit, ¶'s 3-7.

Mr. Lewis did make various attempts to contact Mr. Pike with respect to the loan insurance as pointed out in the above statement of facts. It is appellant's contention that Mr. Pike's failure to follow-up on the requests and inquiries constitutes negligence on his part and actionable by her because she was jointly and severally liable with her husband on the loan. For example, after Mr. Lewis personally dropped off the first note regarding insurance to Mr. Pike, the only evidence that Mr. Pike made any attempt to follow-up on the note is his self-serving statement that he tried to call Mr. Lewis at home "a time or two" during the next two weeks. Mr. Pike admitted that he did not contact anyone by his attempted calls and that he did not send a letter regarding the matter even though he was aware that he was leaving for a vacation. He left for a vacation, leaving the matter completely unattended. Pike deposition, pp 29-32.

The issue of fact as to whether defendants were negligent is further highlighted by a statement Mr. Pike made to appellant after the death of her husband. Although

Mr. Pike had returned from vacation on or before August 28, 1979, he admitted to appellant that he "had not gotten back" with appellant's husband before her husband's death, even though Mr. Pike, on return from his vacation, had received a second note regarding insurance which Mr. Lewis had personally dropped off at The Lockhart Company. Pike deposition, pp 30-32 and 49. Mr. Pike had three weeks after his vacation in which to contact Mr. Lewis regarding this note before Mr. Lewis died of a sudden heart attack on September 17, 1979. Pike deposition, pp 30-32.

Clearly the above discussion indicates that there are issues of material fact with respect to whether defendant was negligent which need to be resolved by a jury. Mrs. Lewis should have her chance to prove negligence.

POINT II: THE DISTRICT COURT ERRED IN CONSIDERING THE SUBSTANCE OF THE TRUTH OF THE MATTER ASSERTED IN HEARSAY COMMUNICATIONS BETWEEN APPELLANT'S DECEASED HUSBAND AND THE DEFENDANTS IN DETERMINING THAT THE DECEASED HAD ELECTED TO FORGO CREDIT LIFE INSURANCE OR WAS UNDECIDED ABOUT SAID INSURANCE.

In reaching a conclusion with respect to defendants' Motion for Summary Judgment, Judge Taylor read the complete text of the second note which had been left for Mr. Pike by the now deceased Mr. Lewis. That note reads as follows:

Dear Mr. Pike,
I left a note for you to give me the info
the amount of life ins would cost per month.
I did not hear from you. Could you please
give me this info.

Thank you,
D. E. Lewis

After reading the above note, Judge Taylor stated in his oral ruling from the bench that, as nearly as counsel can remember, "it is clear from this document that Mr. Lewis, prior to his death, had not decided one way or another about insurance but was only requesting information as to its monthly cost; therefore, summary judgment is proper." The lower court made two fundamental errors in its ruling. First, the note was hearsay and the court used it to prove the truth of the matters asserted therein, i.e., that decedent was merely requesting information as to the cost of the insurance. While this note may be properly considered by the court or by a jury in other contexts such as to show that Mr. Pike was on notice that Mr. Lewis was inquiring about insurance and wanted a response, the court's additional use to ascertain the author's intent was not permissible. Second, even if the decedent was only inquiring about insurance and had not yet made up his mind, that fact or conclusion is immaterial and could not serve as a basis for summary judgment against his widow. Plaintiff's complaint sounds in tort (not contract) and the issues raised by the complaint include the issue of whether defendants were negligent in failing to follow up on the decedent's insurance requests or inquiries in light of appellant's un rebutted statement to Mr. Pike that she would not consent to the issuance of any loan which did not include life insurance on her husband. Lewis Affidavit, ¶'s 4 and 5; Lewis deposition, p 39. The court considered

the note as if Mrs. Lewis had brought a breach of contract action on behalf of her deceased husband's estate or somehow determined that Mr. Lewis' evidenced subjective intent was imputed to his wife, a joint obligor on the loan, to bar her separate negligence claim against the loan officer and other defendants. Clearly the court erred in considering the hearsay statements or inferences in the note with respect to appellant's action for negligence.

POINT III: ASSUMING, ARGUENDO, THAT APPELLANT'S DECEASED HUSBAND ELECTED NOT TO OBTAIN CREDIT LIFE INSURANCE, THE DISTRICT COURT ERRED IN ASSERTING SAID ELECTION AGAINST APPELLANT AS A MATTER OF LAW.

The effect of the court's ruling is that appellant has no cause of action because of the court's finding and interpretation of the subjective intent of Mr. Lewis that he had elected not to obtain credit life insurance since, as the court concluded, he was still undecided about the issue of insurance at the time he wrote the note. Assuming, arguendo, that Mr. Lewis had not decided to obtain insurance or was still undecided, the court's assertion of this election or indecision against appellant as a matter of law, resulting in a dismissal of her claim that the defendants were negligent in handling her part of the loan application procedure, was clearly improper.

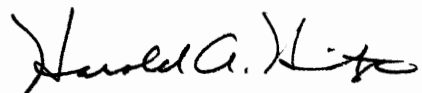
Under Utah law husbands are not automatically the agents for their wives. In Capital Electric Co. v. Campbell, 217 P.2d 392, 394 (Utah 1950), in an action to

foreclose a mechanic's lien, the Utah court held that "some fact or circumstance is required in addition to the marital relation and management of the wife's property by the husband before an agency of the husband will be inferred." The facts and circumstances in the case at bar further negate the possibility of an agency relationship between Mr. and Mrs. Lewis as Mrs. Lewis specifically stated to her husband and Mr. Pike that "she would not consent to the issuance of any loan which did not include credit life insurance on the life of her husband." Lewis affidavit, ¶5. Appellant's deceased husband's alleged subjective intent with respect to the above-referenced note is immaterial and non-assertable against appellant as evidence of contributory negligence on the part of appellant or lack of a duty on the part of defendants.

CONCLUSION

Based on the facts of this case and the applicable rules of law, the appellant requests that this Honorable Court set aside the summary judgment of the lower court and order the case to be tried on the merits.

Respectfully submitted,



Harold A. Hintze
FOX, EDWARDS & GARDINER
Attorneys for Appellant

CERTIFICATE OF SERVICE

This is to certify that the undersigned mailed two copies of the foregoing BRIEF OF APPELLANT to Gifford W. Price of Greene, Callister & Nebeker, Attorneys for Respondents, 800 Kennecott Building, Salt Lake City, Utah 84133, by placing said copies in the U.S. mail, postage prepaid, this 15th day of March, 1982.

FOX, EDWARDS & GARDINER

By Jean Ann Smith
Secretary